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Supreme Court of the United States

OCTOBER TERM, 1969.

No. 62

JACK R. GOLDBERG, COMMISSIONER OF SOCIAL SERVICES OF THE CITY OF NEW YORK,

Appellant,

vs.

JOHN KELLY, RUBY SHEAFE, TERESA NEGRON, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF OF AMICUS CURIAE ON BEHALF OF APPELLEES.

VICTOR G. ROSENBLUM,
3203 S. E. Woodstock Boulevard,
Portland, Oregon 97202,

CRAIG W. CHRISTENSEN,
DANIEL WM. FESSLER,
25 West Chicago Avenue,
Suite 500,
Chicago, Illinois 60610,
Attorneys for Amicus Curiae, National Institute for Education in Law and Poverty.

Of Counsel:
CHRISTOPHER N. MAY,
Director of Research for Amicus Curiae, National Institute for Education in Law and Poverty.

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BRIEF OF AMICUS CURIAE ON BEHALF OF APPELLEES.

INTEREST OF AMICUS CURIAE, NATIONAL INSTITUTE FOR EDUCATION IN LAW AND POVERTY.

The National Institute for Education in Law and Poverty was established at Northwestern University School of Law in 1967 to devise and carry out a program of educational and research support services for the some 2,000 attorneys who are providing free legal assistance for the poor in Legal Services Programs throughout the United States. The objective of the Institute has been to assist

these attorneys in better serving the interests of their clients—the poor, those who cannot afford private counsel to aid them in asserting and vindicating their legal rights.

The media through which the Institute has sought to carry out its mandate have included both the spoken and the written word. Through the sponsorship of educational courses—with a total enrollment as of this writing of more than 3,000 lawyers—the Institute has attempted to illuminate those areas of the law in which innovative effort by poverty law practitioners might serve better to protect the legal interests of their clients. Research in the subjects that comprise the ever-burgeoning body of "poverty law" has led to the publication of seven volumes, in fourteen editions, of materials on the law affecting those who live in poverty. The Institute's *Handbook* series addresses both the law as it exists today and as it ought to be. Through its Clearinghouse Division and its monthly periodical, the *Clearinghouse Review*, the Institute provides for the nation's Legal Services attorneys a central gathering point for the collection and dissemination of pleadings, memoranda of law and other legal work-products of legal assistance practice as well as a forum for the publication of scholarly comment on the legal questions affecting attorneys for the poor.

The legal issues considered by the Institute through all these media have covered the entire spectrum of subjects relevant to the legal problems of the nation's poor. Consumer law, economic development, education, housing and community services have all been addressed by the Institute's educational courses and publications. Throughout, however, a special attention has been reserved for the legal problems of those who are, or ought to be, recipients of public assistance benefits. The Institute's *Handbook on Welfare Law*, now in its fourth edition, and the curriculum for educational courses on the law of welfare have dealt

with such matters as establishing and retaining eligibility, fair hearings, preserving client dignity and privacy, insuring payment based on actual need and guaranteeing fair and rational administrative processes.

Legal questions surrounding a welfare recipient's right to a hearing prior to termination or reduction of assistance have occupied the attention of the Institute since its inception. The process of education being a two-way street, the Institute has learned from its experience in dealing with the nation's Legal Services attorneys that the plight of public assistance recipients who are deprived of sustenance without prior hearing is a matter of the gravest concern and urgency. Thus, the Institute has engaged in extensive research on the fair hearing process in an effort to determine what constitutional and statutory norms must apply to assure that the legal rights of welfare recipients are properly vindicated. In this effort, the Institute has been fortunate to have among its staff the authors of two of the pioneering products of legal research in the welfare fair hearing area: Daniel Wm. Fessler, co-author of *Constitutional Due Process Hearing Requirements in the Administration of Public Assistance: The District of Columbia Experience,* 16 Am. U. L. Rev. 199 (1967); and Christopher N. May, author of *Withdrawal of Public Welfare: The Right to a Prior Hearing,* 76 Yale L. J. 1234 (1967). Both of these articles are among the authorities cited in briefs before the Court in this case.

With the consent of both parties, pursuant to Rule 42 of the Supreme Court Rules, the National Institute for Education in Law and Poverty respectfully submits this brief, Amicus Curiae, in support of appellees.

SUMMARY OF ARGUMENT.

The constitutional right of a recipient of public assistance to notice and hearing before his previously determined statutory entitlement may in any way be impaired was, in the view of amicus, unequivocally established by this Court more than sixty years ago in the case of *Garfield* v. *Goldsby*, 211 U. S. 249, 262 (1908).

In reaffirming the principle of that case, amicus would ask this Court to deal the final and finishing blow to the "rights vs. privileges" dichotomy which still haunts and distorts the administration of justice in the lower courts and administrative agencies. The protections of due process are available wherever government would act to impair the interests of any of its citizens, whether those interests be characterized as privileges or rights. This Court has long recognized that due process is a flexible standard, the content of which must be determined in every case by a weighing of the competing interests at stake.

Wherever the government poses a substantial threat to the life of one of its citizens, this Court has always required that the State satisfy the most stringent standards of due process. The same strict standards must be applied in the instant case, where the government would withdraw the bare means of subsistence from recipients who by definition have been previously found eligible on the basis of a primitive and dire need. This Court should articulate the principle which was the silent premise of two of its earlier decisions this year—that the individual's fundamental interest in subsistence requires that the government satisfy the highest standards of proof and rationality whenever it would seriously threaten to take the health or the life of any of its citizens.

Just as the protections of due process may not be denied

the recipient of welfare on the ground that his interest is a mere "privilege," neither may these safeguards be abridged through resort to the distinction between legislative and adjudicative functions. Amicus does not quarrel with this dichotomy, which limits the opportunity to be heard to those functions of the agency which are adjudicative in nature. Rather, amicus contends only that in all instances where the recipient is aggrieved by an agency threat to his previously established entitlement, the recipient's contest will pose questions which are historically and functionally addressed to adjudication.

As applied to the instant case, due process requires that the hearing to which the welfare recipient is constitutionally entitled must occur before the agency may in any manner reduce, condition or withdraw benefits awarded on the basis of previously determined statutory entitlement. A long line of decisions of this Court supports the necessity of such a prior hearing, and while the Court has upon rare occasion found the use of a summary procedure to be justified, this has only been where such a procedure is firmly rooted in history, or where the emergency nature of the circumstances do not permit the delay of a prior hearing. Neither of these exceptions justify the use of the extraordinary summary process in the administration of public welfare, particularly as this Court has never permitted its use when the sole interest of the state is, as it is here, the saving of revenue.

In assessing the requisite elements of the prior trial-type hearing, it is appropriate to look not only to the relevant constitutional decisions of this Court, but as well to the professional determinations of the agency charged with administering the categorical assistance programs. This dual analysis suggests that the prior hearing must contain, at a minimum, the following nine elements: (1) notice;

(2) discovery; (3) the right to counsel; (4) an oral hearing; (5) confrontation and cross-examination; (6) the right to present evidence and make oral argument; (7) an impartial tribunal; (8) a decision on the record; and (9) judicial review.

The regulations proposed by H. E. W. cannot serve as the basis for a non-constitutional resolution of this case, in that they do not extend to the purely locally-funded general assistance programs in which six of the plaintiffs are recipients. As to these plaintiffs, a constitutional decision is required. Furthermore, the proposed regulations are on their face unconstitutional, for they both permit and encourage the states to continue suspending, withholding and otherwise withdrawing assistance without affording the aggrieved recipient an opportunity for a prior hearing.

ARGUMENT.

I. A RECIPIENT OF PUBLIC ASSISTANCE BENEFITS HAS A CONSTITUTIONAL DUE PROCESS RIGHT TO NOTICE AND A TRIAL-TYPE ADMINISTRATIVE HEARING, WHICH HEARING MUST BE AFFORDED HIM BEFORE THE AGENCY CAN IMPOSE ANY ADVERSE CONSEQUENCES UPON HIS PREVIOUSLY DETERMINED ENTITLEMENT.

In the view of amicus, the right to notice and hearing before one may be deprived of benefits to which he has been previously found legally entitled, as in the case of recipients of public assistance, was settled by this Court as a constitutional requirement of due process of law more than sixty years ago. In *Garfield* v. *Goldsby*, 211 U. S. 249, 262 (1908), a unanimous opinion of this Court declared:

> In the extended discussion which has been had upon the meaning and extent of constitutional protection against action without due process of law, it has always been recognized that one who has acquired rights

by an administrative or judicial proceeding cannot be deprived of them without notice and an opportunity to be heard.

The right to be heard before property is taken or rights or privileges withdrawn, which have been previously legally awarded, is of the essence of due process of law. It is unnecessary to recite the decisions in which this principle has been repeatedly recognized. It is enough to say that its binding obligation has never been questioned in this court.

An analysis of the facts in *Garfield* reveals a substantial analogy to the administration of public assistance benefits.

Involved in the *Garfield* case was the administration of Acts of Congress providing for the distribution of money payments and certain lands among individual members of specified Indian tribes. Eligibility for benefits was to be determined on the basis of citizenship in one of the tribes, and an administrative procedure was established to determine such citizenship and enroll applicants found to be eligible. Act of June 10, 1896, ch. 398, 29 Stat. 339; Act of June 28, 1898, ch. 517, § 11, 30 Stat. 497; Act of July 1, 1902, ch. 1362, 32 Stat. 641. The legislation provided that persons applying and meeting the statutory criteria for eligibility should, upon certification, be entitled as of right to the benefits of the Act, Act of July 1, 1902, ch. 1362, §§ 3, 11, 23, 25, 32 Stat. 641, just as in public assistance persons meeting the statutory eligibility criteria must be awarded the benefits provided by the Social Security Act as a matter of statutory entitlement. See *King* v. *Smith*, 392 U. S. 309, 317 (1968); Social Security Act of 1935, as amended, §§ 402(a) (10), 406(a), 42 U. S. C. §§ 602(a) (10), 606(a) (Supp. IV, 1969). Also like public assistance, where a fair hearing must be afforded applicants whose claims are denied, Social Security Act of 1935, as amended, § 402(a) (4), 42 U. S. C. § 602(a) (4) (Supp. IV, 1969), the legislation involved in *Garfield* established procedures for the adjudication of disputes concerning eligibility. Act

of June 10, 1896, ch. 398, 29 Stat. 339; Act of July 1, 1902, ch. 1362, §§ 24-25, 27-33, 32 Stat. 644.

Petitioner, Goldsby, made application on behalf of himself and his minor children for the benefits provided by the Act, and was found eligible by the Commision responsible for administering the distribution program. His enrollment was approved by the Secretary of the Interior on October 6, 1905. Thereafter, petitioner received an allotment of land and commenced enjoyment of the benefits provided by the Congress. Seventeen months passed, and the Secretary changed his mind. On March 4, 1907, without notice or opportunity for hearing, Goldsby's name was stricken from the rolls. On the precise point that such a procedure involved a denial of due process, Goldsby petitioned the lower federal courts for a writ of mandamus against the Secretary of the Interior seeking to restore the status quo. He was successful. 211 U. S. at 256-58.

The Secretary's appeal to this Court was unanimously rejected. While the case involved questions of statutory construction, the Court affirmed on a rule of decision which swept beyond the particular facts and addressed itself generally to the broader question of the relationship between the individual citizen and the state. There is, said the Court, "no place in our constitutional system for the exercise of arbitrary power. . . . The right to be heard *before* property is taken or *rights or privileges withdrawn*, which have been previously legally awarded, is of the *essence of due process of law.*" 211 U. S. at 262 (emphasis added). *Accord, Ex parte Robinson*, 86 U. S. 505, 513 (1873): "The principle that there must be citation before hearing, and hearing or opportunity of being heard before judgment, is essential to the security of all private rights. Without its observance no one would be safe from oppression wherever power may be lodged."

The arbitrary cessation of benefits without notice or prior hearing is surely at least as pernicious when the disadvantaged victims are public assistance recipients, who look to the benefits at stake for their very survival, as it is in the case of Indians deprived arbitrarily of the enjoyment of their ancient tribal lands. If, as amicus believes, the rule of *Garfield* v. *Goldsby* requires notice and prior hearing as much in the former case as in the latter, there remains the question as to the nature of the proceeding required to assure the due process of law. Amicus contends that the answer to this question too is well settled by long-established principles enunciated by this and other courts. When, as in public assistance determinations which would deprive recipients of previously-enjoyed benefits, "governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals," nothing less than a full trial-type hearing will suffice to satisfy the requirements of due proces. "[I]t is imperative that those agencies use the procedures which have traditionally been associated with the judicial process." *Hannah* v. *Larche*, 363 U. S. 420, 442 (1960); *Southern Railway Co.* v. *Virginia*, 290 U. S. 190, 199 (1933); *Philadelphia Co.* v. *S.E.C.*, 175 F. 2d 808, 817 (D. C. Cir. 1948). In the *Philadelphia Co.* case, the court provided a concise summary of the protective norms which amicus believes to be constitutionally required here (175 F. 2d at 817):

> It is elementary also in our system of law that adjudicatory action cannot be validly taken by any tribunal, whether judicial or administrative, except upon a hearing wherein each party shall have opportunity to know the claims of his opponent, to hear the evidence introduced against him, to cross-examine witnesses, to introduce evidence in his own behalf, and to make argument. This is a requirement of the due process clause of the Fifth Amendment of the Constitution.

To this list we would add a right to have the agency decision made by an impartial hearing officer, *In re Murchison*, 349 U. S. 133 (1955); which decision is based solely upon the record made at that hearing, *United States and I. C. C.* v. *Abilene & Southern Railway Co.*, 265 U. S. 274, 288-89 (1924); *Ohio Bell Telephone Co.* v. *Public Utilities Comm'n. of Ohio*, 301 U. S. 292, 300-04 (1937). These contentions will be revisited in a subsequent section of this brief.

Amicus respectfully contends that *Garfield* v. *Goldsby, supra,* and *Hannah* v. *Larche, supra,* are controlling; and to the extent that current or proposed administrative practices either as formulated or applied deny welfare recipients adequate notice and a prior trial-type hearing, they unconstitutionally deny "the essence of due process." *Goldsby, supra,* 211 U. S. at 262.

A. The Time Has Come for This Court to Squarely Repudiate the "Right vs. Privilege" Dichotomy and to Reaffirm That Regardless of the Nature of the Affected Interest, Due Process Forbids the Government from Ever Acting Arbitrarily, Either Substantively or Procedurally, Against a Citizen.

A resolution of this appeal based on *Garfield* v. *Goldsby*, 211 U. S. 249, 262 (1908), affords this Court a singular opportunity to finally eradicate a legal aneurysm which too long has threatened disruption in the flow of due process. Reference is to the "right vs. privilege" dichotomy. While amicus contends for a total demise in all circumstances, the destruction of this determinant in the context of this case—and the primitive human interests here affected—is most appropriate. The unavoidable lesson of *Garfield*, that "the right to be heard before property is taken or *rights or privileges withdrawn*," is a complete answer to the dichotomists. *Ibid.* (Emphasis added). Yet,

as will be shown, the words of this Court have not been entirely heeded in the more than sixty intervening years.

Among the most troublesome aspects of public assistance administration is the notion that a citizen has no recourse to the norms of due process if the government's action threatens a "privilege" as opposed to a "right". This dichotomy, which was crystallized in an epigram coined by Mr. Justice Holmes during his service on the Supreme Judicial Court of Massachusets,[1] places a premium upon labels and abstract characterizations rather than focusing upon the techniques which the government seeks to employ and their effect upon the threatened interest which is at stake. First articulated in 1892, such a distinction was of questionable value even in that era of rugged individualism when the role of government, save for police protection, bore little direct impact on the life of a private citizen. It is a wholly dangerous and unacceptable determinant in an age marked by an ever-increasing social interdependence and an expanding popular function of government as a source of both direction and limita-

1. "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." *McAuliffe* v. *Mayor of New Bedford*, 155 Mass. 216, 220, 29 N. E. 517 (1892). It would appear to amicus that Mr. Justice Holmes was not a victim of the "facile generalization" which his epigram in the *McAuliffe* case has spawned. Twenty-six years after the statement was articulated, Holmes wrote:

> [F]or legal purposes a right is only the hypostatis of a prophecy—the imagination of a substance supporting the fact that the public force will be brought to bear upon those who do things said to contravene it—just as we talk of the force of gravitation accounting for the conduct of bodies in space. One phrase adds no more than the other to what we know without it.

Holmes, *Natural Law*, 32 Harv. L. Rev. 40, 42 (1918).

Upon reflection, "privilege" has come off no better. "Suffice it to note that 'privilege' is simply a label which expresses a conclusion reached on other grounds; it tells us nothing about the reasons, if any, for the conclusion." Byse, *Opportunity To Be Heard in License Issuance*, 101 U. Pa. L. Rev. 57, 69 (1952).

tion in the pursuit of "private interests." Yet, riddled with exceptions, this judge-made invitation to oppression continues to survive . . . if not in this Court . . . then in the minds of countless administrative bureaucrats and magistrates to whom it is an ever present summons to complete by semantics journeys only analytically begun.

The persistent refusal of even the most sympathetic lower courts to recognize a constitutional "right" in the individual needy citizen's claim to assistance benefits has meant that this dichotomy continues to cloud access to due process for a class of citizens particularly susceptible to abuse at the hands of arbitrary government officials. *Smith* v. *King*, 277 F. Supp. 31, 40 (M. D. Ala., 1967), "It should be noted that there is no vested legal right for anyone to receive public financial assistance; . . ."; *Camerena* v. *Department of Public Welfare*, 9 Ariz. App. 120, 449 P. 2d 957, 960-61 (1969), "We agree that the right to receive benefits is not a constitutional right"; and, *Westberry* v. *Fisher*, 297 F. Supp. 1109, 1115 (D. Me., 1969), "Unquestionably, there has historically been no vested right to public welfare." In each of these cases, the court was able to go beyond this stumbling block by a technique analogous to the old confession and avoidance. In *Smith* and *Westberry*, the Equal Protection Clause became the vehicle for achieving constitutional protection. In *Camerena*, the court expressly joined a "growing number of cases which depart from this rigid doctrine and apply constitutional principles of procedural fairness even though only a privilege is involved." 449 P. 2d 961.

From time to time, this Court has found the dichotomy productive of unconscionable results and has refused to apply it. This has led to its erosion on a case by case basis. Most recently—and of special significance in the context of public assistance administration—the Court only last term rejected the notion that the invocation of

this ancient doctrine might somehow obviate the unconstitutionality of durational residence requirements for Aid to Families with Dependent Children. "This constitutional challenge cannot be answered", said the Court, "by the argument that public assistance benefits are a 'privilege' and not a 'right'." *Shapiro* v. *Thompson*, 394 U. S. 618, 627 n. 6 (1969).

Other contexts as well have seen the dichotomy fall by exception. Public employment: "To draw . . . the facile generalization that there is no constitutionally protected right to public employment is to obscure the issue . . . We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory." *Wieman* v. *Updegraff*, 344 U. S. 183, 191-192 (1952). "Of course no one has a constitutional right to a government job. But every citizen has a right to a fair trial when his government seeks to deprive him of the privileges of first-class citizenship." *Joint Anti-Fascist Refugee Comm.* v. *McGrath*, 341 U. S. 123, 182-83 (1951) (Douglas, J., concurring). Unemployment compensation: "Nor may . . . the statute be saved from constitutional infirmity on the ground that unemployment compensation benefits are not appellant's 'right' but merely a 'privilege'." *Sherbert* v. *Verner*, 374 U. S. 398, 404 (1963). Practice of professional employment: "We need not enter into a discussion whether the practice of law is a 'right' or 'privilege'. Regardless of how . . . characterized, it is sufficient to say that a person cannot be prevented from practicing except for valid reasons." *Schware* v. *Board of Bar Examiners*, 353 U. S. 232, 239 n. 5 (1957).

Notwithstanding these inroads, the dichotomy enjoys a current vitality in the minds of countless more-or-less in-

formed state and local officials. The recent position of the Attorney General of Maine is illustrative of the danger that lies in eroding a doctrine which should be squarely repudiated. In *Westberry* v. *Fisher, supra,* 297 F. Supp. at 1115, the court noted: ". . . The Attorney General's position is simply that, since there is no vested right to public welfare, the State may distribute its largesse in any way it wishes and among any of its citizens it chooses to favor." Although the court rejected this assertion, the impact of its decision was simply to create another exception to the doctrine. And while one commentator has recently declared on the basis of extensive research that the "right *vs.* privilege" dichotomy is either dead or dying,[2] *it remains for this Court to finally inter the notion, itself abstractly disquieting, that in some unarticulated circumstances the government, and those acting under color of its authority, are free to act in a manner totally unfettered by the strictures of fundamental fair play.*

This Court has never condoned the exercise of arbitrary and capricious conduct on the part of agents of the state. Due process has always meant at least that. "Arbitrary power and the rule of the Constitution cannot both exist. They are antagonistic and incompatible forces; and one or the other must of necessity perish whenever they are brought into conflict." *Jones* v. *S. E. C.,* 298 U. S. 1, 24 (1936). Amicus asks only that the Court now make unequivocally clear that this unbending rule of due process must prevail whenever government would act to impair the interests of its citizens, *and that it can know of no exception whether those interests be characterized as matters of "privilege" or of "right."*

2. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law,* 81 Harv. L. Rev. 1439 (1968). See also Comment, *Withdrawal of Public Welfare: The Right to a Prior Hearing,* 76 Yale L. J. 1234, 1237-39 (1967).

Amicus believes its plea for such an articulation of the minimal requirements of due process asks not for the promulgation of a new and novel doctrine, but rather for the reassertion of what ought to be the inescapable reading of countless decisions already rendered by this Court. See *Shapiro* v. *Thompson, supra*; *Wieman* v. *Updegraff, supra; Joint Anti-Fascist Refugee Comm.* v. *McGrath, supra; Sherbert* v. *Verner, supra; Schware* v. *Board of Bar Examiners, supra; Jones* v. *S. E. C., supra.* Against this authority, the "facile generalization" (*Wieman* v. *Updegraff, supra*, 344 U. S. at 191), that is the "right *vs.* privilege" dichotomy surely has no place. Yet the persistent question, "does the aggrieved citizen seek vindication of an interest in which he has a right?" indicates that the dichotomy thrives at a lower level of decision—both judicial and administrative—where it works great mischief in tribunals having neither the time, the vision, nor the inclination to pass beyond the facile. Where the delicate relationship between the individual citizen and the impersonal state is in dispute the facile solution is too often dangerous. Surely it is here. Responsible state and local officials vested with a mandate to provide bare sustenance to the least advantaged of our citizens still deem themselves to be acting out of grace. *E. g., Westberry* v. *Fisher, supra*, 297 F. Supp. at 1115. But nearly seventy years ago this Court declared: "The right of a citizen to due process of law must rest upon a basis more substantial than favor or discretion." *Roller* v. *Holly*, 176 U. S. 398, 409 (1900). That lesson must be reinforced in the plainest terms.

Having once again declared that those who exercise the power of government are never free to act in an arbitrary or capricious manner—and that the characterization of the interest at stake as "right" or "privilege" is irrelevant for this rule of due process—amicus would urge the Court

to rearticulate its position as to the content this due process right must have in any given case. This Court has said many times that "by 'due process' is meant one which, following the forms of law, is *appropriate to the case, and just to the parties to be affected.*" *Hagar* v. *Reclamation District,* 111 U. S. 701, 708 (1884) (reviewing early authorities) (emphasis added). "'[D]ue process', unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. . . . Due process is not a mechanical instrument. It is not a yardstick. It is a process." *Joint Anti-Fascist Refugee Comm.* v. *McGrath,* 341 U. S. 123, 162-63 (1951) (Frankfurter, J., concurring). See also *Hannah* v. *Larche,* 363 U. S. 420, 442 (1960). Thus, not only is the content of due process protection to be tailored to the requirements of each particular case, but the remoteness or immediacy of the citizen's interest, its quality and quantity, are all elements which are properly accounted in striking a balance between economy and convenience to the state, on the one hand, and the injury, inconvenience and debasement of the individual citizen on the other.

In this context, amicus believes this Court should declare anew that the due process norms of fundamental fair play must expand to adjust the weight of the government's burden of justification in direct ratio to the gravity of the citizen's threatened interest. *Joint Anti-Fascist Refugee Comm.* v. *McGrath, supra,* 341 U. S. at 163 (Frankfurter, J., concurring). In the opinion of amicus, the application of such a test could not but result in the imposition of the most stringent standard when, as in this case, the interest at stake is the most primitive and fundamental right to survive.

The Court of Appeals for the District of Columbia Circuit recently articulated a rule not unlike the one here urged by amicus, but in the context of government con-

tracts: "[T]o say that there is no 'right' to government contracts does not resolve the question. . . . Of course there is no such *right;* but that cannot mean that the government can act arbitrarily, either substantively or procedurally, against a person or that such person is not entitled to challenge the processes and the evidence before he is officially declared ineligible for government contracts." *Gonzales* v. *Freeman,* 334 F. 2d 570, 574 (1964). Surely the interest of citizens deprived of public assistance benefits to which they have been previously found entitled deserves no less protection.

B. The Interest of the Welfare Recipient in Subsistence Is so Fundamental as to Require the Government to Meet the Most Stringent Standard of Due Process Before It May in Any Way Impair His Entitlement.

For millions of this country's poor, public assistance represents "the very means to subsist. . . ." *Shapiro* v. *Thompson,* 394 U. S. 618, 627 (1969). The arbitrary or erroneous withdrawal of these critical benefits from one who is still in need may well cause an irreparable harm to health, or the loss of life itself. Given this most primitive and brutal need, it is imperative that before the welfare recipient's statutory entitlement may be impaired, he be given nothing less than the full panoply of constitutional due process protection.

Recognizing that certain human interests are more fundamental than others, this Court has held them deserving of special judicial protection. *Skinner* v. *Oklahoma,* 316 U. S. 535 (1942) (marriage and procreation); *Brown* v. *Board of Educ.,* 347 U. S. 483 (1954) and *Bolling* v. *Sharpe,* 347 U. S. 497 (1954) (education); *Griffin* v. *Illinois,* 351 U. S. 12 (1956) (criminal appeals); *Reynolds* v. *Sims,* 377 U. S. 533 (1964) (voting). Where such fundamental interests

are at stake, whether it be in the context of due process or equal protection, this Court has insisted upon imposing a strict standard of judicial review.[3]

In two recent cases in which the government threatened to upset the precarious balance which the poor had wrought from life, this Court applied the strictest standard of review. *Shapiro* v. *Thompson, supra; Sniadach* v. *Family Finance Corp.*, 395 U. S. 337 (1969). The decisions in both of these cases reflect the Court's awareness of the peculiar and oftentimes overwhelming problems of the poor. And while the opinions in both cases were couched in relatively orthodox terms, there lurked beneath the surface a principle which amicus would ask this Court to articulate unequivocally today: *that the interest of all citizens in subsisting and enduring in an affluent age of sometimes heartless change is a personal interest of the most fundamental and profound proportions, and is susceptible of being threatened only by means consonant with the strictest standards of proof and rationality.*

Amicus does not ask this Court to deliver the affirmative right to life whereby the State would be constitutionally obliged to assure all of its citizens an adequate existence. Rather, amicus simply asks this Court to require, as it has done in all other areas where the government would threaten the life of any of its citizens, that such actions of the State be held to the highest standard of constitutional due process.

In *Shapiro* v. *Thompson*, the Court required the state to show a "compelling interest" before it could deny welfare assistance to otherwise eligible persons who had not satisfied the state's residency requirement. In a decision based upon the Equal Protection Clause, the Court found no

3. See Comment, *Developments in the Law: Equal Protection*, 82 Harv. L. Rev. 1065, 1127-32 (1969).

legitimate or compelling state concern, and held the residency laws unconstitutional. While the ostensible basis of the decision was interference with the constitutionally protected right to travel, the Court's obvious underlying concern was that these laws denied nearly two hundred thousand of the poor "the very means to subsist. . . ." 394 U. S. at 627. As Mr. Justice Harlan noted in his dissenting opinion, the majority came very close to identifying the brutal need to survive as a fundamental interest. 394 U. S. at 660-61.

In *Sniadach* v. *Family Finance Corp.*, the Court invalidated Wisconsin's prejudgment garnishment statute on the ground that it failed to comply with the "fundamental principles of due process," *i.e.*, "notice and a prior hearing. . . ." 395 U. S. at 342. In applying the flexible norms of due process, the critical factor for the Court was not that property was involved, but rather "the *nature* of that property." 395 U. S. at 340 (emphasis added). The attachment of wages posed a very real threat to subsistence, for the frequent effect of the garnishment law was to "impose tremendous hardship on wage earners with families to support." *Ibid.* "The result is that a prejudgment garnishment of the Wisconsin type may as a practical matter drive a wage-earning family to the wall." 395 U. S. at 341-42. As in *Shapiro*, the fundamental nature of the subsistence interest led the Court to impose the strictest standards of fairness, standards which, in both cases, proved to be insurmountable.

This same primitive and fundamental personal interest is again threatened in the case before the Court today. The Fifth and Fourteenth Amendments declare that no person shall be deprived of life without due process of law. While the due process provision has seen its greatest use in the criminal area, the changing role of government de-

mands that the scope of this constitutional safeguard be similarly adapted to meet threats newly posed to the poor. The era of the Elizabethan Poor Laws and the local care of the poor has passed. Today it is the federal government, along with the states, that has assumed the burden and the responsibility of caring for the needy. More than nine million persons, most of them children, now depend upon the sometimes shaky hand of State for their mere survival. And the number grows daily. Should that hand be arbitrarily or erroneously withdrawn from one still needy of its aid, health and life may likewise pass.

Mr. Justice Brandeis, speaking years ago for this Court, assured that the protections of due process were available to check the State, whether it would deprive of life, "or of all that makes life worth living." *Ng Fung Ho* v. *White*, 259 U. S. 276, 284 (1922). Public assistance benefits represent the foundation upon which life may go on. Surely the poor are entitled to the same protection as the criminally accused. In both realms, the State must meet the very highest standards of due process before it may suffer an interest as precious as life to decline or perish.

C. The Recipient's Constitutional Right to a Prior Trial-Type Hearing Is Not Precluded by the "Legislative vs. Adjudicative" Dichotomy, for in All Cases a Recipient Aggrieved by the Agency's Threat Poses Questions Historically and Functionally Addressed to Adjudication.

On numerous occasions this Court has declared that hearings are required for judicial functions, but that when the agency is embarked upon legislative tasks the absence of notice and opportunity to be heard is not offensive to due process. *E.g., The Assigned Car Cases*, 274 U. S. 564, 582-83 (1927). The lesson is basically one of history. *Bi-Metallic*

Investment Co. v. *State Bd. of Equalization*, 239 U. S. 441, 445 (1915). And with it amicus has no quarrel. The fact that the Due Process Clauses have never been interpreted to confer an enforceable right to appear before a legislative body is acceptable when it is also recalled that from our earliest history a citizen aggrieved by the application of a legislative pronouncement, on the theory that as applied to his estate it was offensive to the "law of the land" has enjoyed a due process right to a judicial forum. See generally, Cooley, Constitutional Limitations, 352-53 (3d ed. 1874) (drawing upon the argument made by Daniel Webster before this Court in *Dartmouth College* v. *Woodward*, 17 U. S. (4 Wheat.) 518 (1819), and collecting early federal and state decisions).

Amicus contends that the dichotomy based upon agency function does not cloud the right of an individual recipient of assistance benefits to notice and a prior hearing in order that he might challenge an *ex parte* agency threat to his previously determined entitlement. In all such cases, the recipient's contest will pose questions historically and functionally addressed to adjudication. This historical and functional distinction was clearly drawn by Mr. Justice Holmes speaking for this Court in *Prentis* v. *Atlantic Coast Line Co.*, 211 U. S. 210, 226 (1908):

> . . . A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power.

Based upon this distinction Mr. Justice Frankfurter gave guarded approval to a determinant reflecting function: ". . . when decisions of administrative officers in execution of legislation turn exclusively on considerations similar to

those on which the legislative body could itself have acted summarily, notice and hearing *may* not be commanded by the Constitution." *Joint Anti-Fascist Refugee Comm.* v. *McGrath, supra,* 341 U. S. at 167 (emphasis added).

Measured by these guidelines, "adjudication" is involved in every facet of the following—a typical public assistance conflict:

> Agency: "Mrs. Jones, it has come to our attention that you have an adult male living in your home. Under our rules your AFDC assistance grant must be reduced by taking into account his earnings. Please be advised that your November check will not be issued until this adjustment has been made."

In response to this notice, Mrs. Jones requests a "fair hearing" at which, unrepresented by counsel, she raises the following contentions:

> Client: "The 'man' to which your notice has reference is my mentally retarded brother. He has no money, and while he is around he is a drain on our already inadequate grant. Besides, even if he were to live with us permanently, for you to reduce the amount of my children's AFDC assistance is illegal."

Assuming that the local agency complies with current Federal Handbook directives and assists Mrs. Jones in "preparing [her] case" (Part IV, § 6300(b)), the recipient's request for a hearing raises two types of issues, both distinctly "adjudicatory".

In the first instance, Mrs. Jones is contesting the fact that the man found in her home presents the type of situation covered by the so-called "man in the house rule." The resolution of this factual dispute is clearly the historical function of the courts, and when performed by administrative bodies is inescapably "adjudicatory" in nature. Of equal importance is the second issue . . . her constitutional and statutory argument that in threatening her with the

man in the house rule the agency is seeking to destroy or diminish her previously determined entitlement in a manner which is offensive to law. Again, an interpretation of the mandate of constitutional and statutory rules so as to make "binding determinations which directly affect the legal rights of individuals" involves an exercise of the judicial function, and hence requires an application of those "procedures which have traditionally been associated with the judicial process." *Hannah* v. *Larche*, 363 U. S. 420, 442 (1960). To deny that this challenge poses questions of an "adjudicatory" nature requires the assertion that historically and functionally such challenges have been determined in the halls of Congress and the several state legislatures. Such an absurd proposition finds no basis in history, and is offensive to the basic notion of the separation of powers. See generally, Cooley, Constitutional Limitations, *supra*, at 352-53. *C.f.*, *Crowell* v. *Benson*, 285 U. S. 22, 56-7 (1932); and, *Ohio Valley Water Co.* v. *Ben Avon Borough*, 253 U. S. 287, 289 (1920).

The simple fact of the matter is that in the field of public assistance administration neither state nor local agencies engage in pure "rule making" activities. Thus, their decisions never "turn exclusively on considerations similar to those on which the legislative body could itself have acted summarily. . . ." *Joint Anti-Fascist Refugee Comm., supra*, at 167. Rather, in a challenge to an existing assistance grant (on any of the aforementioned grounds) the agency inquiry "declares and enforces liabilities as they stand on present or past facts *and* under laws supposedly already to exist." *Prentis, supra*, 211 U. S. at 226 (emphasis added). Where this function is the agency's end, the command is clear that judicial process must be the means. *Hannah* v. *Larche*, *supra*, 363 U. S. at 442.

The accuracy of this characterization is reflected in the current provisions of the Federal Handbook which define

the scope of the "fair hearing" to expressly include: "Consideration of the agency's interpretation of the law, and the reasonableness and equitableness of the policies promulgated under the law, if the claimant is aggrieved by their application to his situation." Handbook, Part IV, § 6300 (c)(2). Far from being an act of "agency grace" amicus contends that this provision of the Handbook represents a valid recognition that, within the context of an individual recipient's case, the threat to an established grant predicated upon a formal or informal interpretation of the law (both constitutional and statutory) represents a topic ripe for "judicial determination." Standing having been conferred by "their application to his situation," to accord the recipient a "fair hearing" is to observe the requirements of due process.

Where the recipient's position takes the form of an exclusive attack upon the legal validity of the rule under which the agency is seeking to adversely affect his previous entitlement (and amicus contends that this will rarely be the case), he has a due process right to a "fair hearing." The final question is whether such a recipient is somehow less entitled to a "prior hearing" than would be the case if his resistance also took the form of a factual dispute. Garfield v. *Goldsby, supra,* 211 U. S. at 262, suggests no relaxation in the requirement that the "right to be heard" take the form of a prior proceeding. Equally dispositive is the undeniable fact that the need of the recipient, that he should not be summarily stripped of the necessities of physical subsistence, is identical in both cases. *Shapiro* v. *Thompson,* 394 U. S. 618, 627 (1969). Thus while the flexible norms of due process might well be satisfied by a hearing in which the reasonableness or equitableness of the agency's interpretation of the law was the subject of "argumentation" as opposed to a "trial-type" proceeding, amicus would contend that it does not present the "extraordinary" situation

in which a deviation from the norm of a "prior hearing" is permissible. *Sniadach* v. *Family Finance Corp.*, 395 U. S. 337, 339 (1969). See Part I-D, *infra*.

D. The Hearing to Which Welfare Recipients Are Constitutionally Entitled Must Occur Before Benefits Are Terminated, Suspended, Reduced or Otherwise Withdrawn.

> "The laws of God and man both give the party an opportunity to make his defence, if he has any. I remember to have heard it observed by a very learned man upon such an occasion, that even God himself did not pass sentence upon Adam, before he was called upon to make his defence. Adam (says God) where art thou? Hast thou not eaten of the tree, whereof I commanded thee that thou shouldst not eat? And the same question was put to Eve also." *The King* v. *The Chancellor, Masters and Scholars of the University of Cambridge*, 1 Str. (K. B.) 557, 567; 93 Eng. Reports 698, 704 (1723) (Fortescue, J.).

The principle that one has a right to be heard before he may be adversely harmed by the state is "[t]he fundamental requisite of due process of law . . ." *Grannis* v. *Ordean*, 234 U. S. 385, 394 (1914), and has been deeply woven into the fabric of our Anglo-American civilization since the time of the Magna Charta. One of the earliest American formulations of this fundamental constitutional principle interpreted the due process provision of the New York constitution, and was referred to by this Court in *Murray's Lessee* v. *Hoboken Land and Improvement Co.*, 59 U. S. [18 How.] 272, 280 (1855).

> "The meaning of the section then seems to be, that no member of the State shall be disfranchised, or deprived of any of his rights or privileges, unless the matter shall be adjudged against him upon trial had according to the course of the common law. It must be

> ascertained judicially that he has forfeited his privileges, or that some one else has a superior title to the property he possesses, *before* either of them can be taken from him." *Taylor* v. *Porter*, 4 Hill 140, 146, 15 N. Y. Common Law Rpts. 773, 775 (N. Y. Supreme Court, 1843). [emphasis added.]

This basic principle has been articulated and enforced by this Court upon far too many occasions for there to be any lingering doubt as to its central place in our constitutional system of government.

In 1876, quoting from Justice Story's opinion in *Bradstreet* v. *Neptune Insurance Co.*, 3 F. Cas. 1184, 1187 (C. C. D. Mass. 1839), this Court stated that "It is a rule . . . founded in the first principles of natural justice, that a party shall have an opportunity to be heard in his defence *before* his property is condemned. . . ." *Windsor* v. *McVeigh*, 93 U. S. 274, 280 (1876) [emphasis added].

In 1895, in *Winona & St. Peter Land Co.* v. *Minnesota*, 159 U. S. 526, 537, the Court again articulated this due process principle, collecting a number of the earlier authorities.

> "That rule is that a law authorizing the imposition of a tax or assessment upon property according to its value does not infringe that provision of the Fourteenth Amendment to the Constitution, which declares that no State shall deprive any person of property without due process of law, if the owner has an opportunity to question the validity or the amount of it either before that amount is determined or in subsequent proceedings for its collection. *McMillen* v. *Anderson*, 95 U. S. 37; *Davidson* v. *New Orleans*, 96 U. S. 97; *Hagar* v. *Reclamation District*, 111 U. S. 701; *Spencer* v. *Merchant*, 125 U. S. 345; *Palmer* v. *McMahon*, 133 U. S. 660; *Lent* v. *Tillson*, 140 U. S. 316; *Pittsburg, Cincinnati & E. Railway* v. *Backus*, 154 U. S. 421."

Several years later in another suit involving taxation, the Court held that "due process of law requires that at some stage of the proceedings *before* the tax becomes irrevocably fixed, the taxpayer shall have an opportunity to be heard. . . ." *Londoner* v. *Denver*, 210 U. S. 373, 385 (1908) [emphasis added]. That same year, this Court declared that, "The right to be heard *before* property is taken or rights or privileges withdrawn, which have been previously legally awarded, is of the essence of due process of law." *Garfield* v. *Goldsby*, 211 U. S. 249, 262 (1908) [emphasis added].

In *Southern Railway Co.* v. *Virginia*, 290 U. S. 190, 199 (1933), a case challenging a state order requiring the railroad to construct an overpass, the Court held that, "*Before* its property can be taken under the edict of an administrative officer the appellant is entitled to a fair hearing on the fundamental facts." [Emphasis added.]

A year later, in *United States* v. *Illinois Cent. R.R.*, 291 U. S. 457, 463 (1934), this Court held that while the Interstate Commerce Commission could initiate a rate change without formal proceedings, due process required "a full and fair hearing *before* the order became operative." [Emphasis added.] The principle was again reiterated several years later in *Morgan* v. *United States*, 304 U. S. 1, 18-19 (1938):

> "Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals *before* it issues its final command." [Emphasis added.]

This Court in 1941 upheld a minimum wage order, stating that "The demands of due process do not require a hearing, at the initial stage or at any particular point or at more than one point in an administrative proceeding so long as

the requisite hearing is held *before* the final order becomes effective." *Opp Cotton Mills, Inc.* v. *Administrator*, 312 U. S. 126, 152-53 (1941) (emphasis added). And more recently, in *Mullane* v. *Central Hanover Trust Co.*, 339 U. S. 306, 313 (1950), this Court again formulated the constitutional rule. "Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be *preceded* by notice and opportunity for hearing appropriate to the nature of the case." [Emphasis added.]

The clearest and most helpful statement of the due process norm is perhaps that of Mr. Justice Frankfurter in *Joint Anti-Fascist Refugee Comm.* v. *McGrath*, 341 U. S. 123, 168 (1951) (concurring opinion): "This Court is not alone in recognizing that the right to be heard *before* being condemned to suffer *grievous loss of any kind*, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society." [Emphasis added.] Four other members of this Court adopted this statement of the rule in *Cafeteria and Restaurant Workers* v. *McElroy*, 367 U. S. 886, 901 (1961) (Brennan, J. dissenting).

Only a few years ago, in a case upholding a father's right to a hearing before his natural child could be taken from him by adoption, this Court observed that, "A fundamental requirement of due process is 'the opportunity to be heard.' *Grannis* v. *Ordean*, 234 U. S. 385, 394. It is an opportunity which must be granted at a meaningful time and in a meaningful manner." *Armstrong* v. *Manzo*, 380 U. S. 545, 552 (1965).

This Court's most recent articulation of the constitutional right to be heard before the government may adversely affect one's interests, was in *Sniadach* v. *Family Finance Corp.*, 395 U. S. 337 (1969), in which Wisconsin's

prejudgment garnishment statute was held unconstitutional. The Court, citing *Mullane* v. *Central Hanover Trust Co.*, 339 U. S. 306, 314 (1950), stated that "In the latter case we said that the right to be heard 'has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to . . . acquiesce or contest'." 395 U. S. at 339-40. Though the Court noted that "wages—a specialized type of property" were involved in the case, the analysis focussed much more centrally and meaningfully on the substantiality of the interest at stake. After noting that "a prejudgment garnishment of the Wisconsin type may as a practical matter drive a wage earning family to the wall," the Court had no difficulty in holding that "absent notice and a prior hearing . . . this prejudgment garnishment procedure violates the fundamental principles of due process." 395 U. S. at 341-42.

The case before this Court today requires a similar conclusion. Whereas the effect of a prejudgment garnishment of wages may be to "drive a wage earning family to the wall," the welfare recipient, even with the assistance he receives, finds himself already at the wall. And as the Court has noted, "[t]his constitutional challenge cannot be answered by the argument that public assistance benefits are a 'privilege' and not a 'right.' " *Shapiro* v. *Thompson*, 394 U. S. 618, 627 n.6 (1969). Rather, the critical factor must be the nature of the interest involved. Amicus strongly contends that the interest of the public welfare recipient, about to be deprived of the bare means of subsistence, is as great, if not greater than the similar plight of a family whose wages are attached.

Nor is the case before this Court today one of the "rare and isolated instances" in which summary administrative procedure is permissible. *Joint Anti-Fascist Refugee Comm.* v. *McGrath*, 341 U. S. 123, 168 (1951) (Frankfurter, J., con-

curring). In *Sniadach*, this Court noted that "summary procedure," in which there is no opportunity for a hearing before the harm occurs, will meet the requirements of due process only in "extraordinary situations." 395 U. S. at 339. The use of the summary process has been characterized by this Court as a "drastic procedure." *Fahey* v. *Mallonee*, 332 U. S. 245, 253 (1947). This Court has *never* upheld the use of such a process where the sole interest of the state was to protect its purse.

In fact, the instances in which this Court has found use of the summary process to be constitutionally permissible are exceedingly rare. "Only the narrowest exceptions, justified by history become part of the habits of our people or by obvious necessity, are tolerated." *Joint Anti-Fascist Refugee Comm.* v. *McGrath*, 341 U. S. 123, 164-65 (1951) (Frankfurter, J., concurring). In a small number of cases, deeply-rooted historical precedent has legitimized use of a summary procedure. Thus, in *Murray's Lessee* v. *Hoboken Land and Improvement Co.*, 59 U. S. (18 How.) 272, 277 (1855), *Springer* v. *United States*, 102 U. S. 586 (1880), and *Phillips* v. *Commissioner*, 283 U. S. 589 (1931), this Court approved the summary seizure of property belonging to a debtor of the United States, on the ground that "since the establishment of the English monarchy," there has always been "a summary method for the recovery of debts due to the crown. . . ." 59 U. S. (18 How.) at 277. In *Lawton* v. *Steele*, 152 U. S. 133 (1894), the Court approved the summary seizure of fish nets illegally employed, under a statute permitting such abatement of a public nuisance. In *Ownbey* v. *Morgan*, 256 U. S. 94 (1921), this Court sanctioned Delaware's *ex parte* foreign attachment law which had its origin in the Custom of London. In *Cooke* v. *United States*, 267 U. S. 517 (1925), the Court noted that contempts committed in open court may be punished, as was the custom at common law,

summarily and without opportunity for a hearing. In *Coffin Bros.* v. *Bennett,* 277 U. S. 29 (1928), the Court permitted the property of shareholders of an insolvent bank to be summarily attached by the bank's creditors.

Aside from these few instances in which historical custom has prevailed, this Court has permitted the summary procedure only in cases in which the delay occasioned by a prior hearing would pose a serious and direct threat to the health, safety or well-being of other individuals. "If the contagion is spreading, or the harmful medicinal preparation is being sold to the public, summary administrative action in advance of hearing is appropriate. . . . Drastic administrative action is sometimes essential to take care of problems that cannot be allowed to wait for the completion of formal proceedings." 1 K. Davis, Administrative Law Treatise, § 7.08, at 438 (1958). Thus, in *North American Cold Storage Co.* v. *City of Chicago,* 211 U.S. 306 (1908), this Court upheld the summary seizure and destruction of allegedly decayed poultry. In *Yakus* v. *United States,* 321 U. S. 414 (1944) and *Bowles* v. *Willingham,* 321 U. S. 503 (1944), the Court upheld summary price and rent regulations under the Emergency Price Control Act of 1942, on the ground that they were necessary to prevent inflation under the "exigencies of wartime conditions." 321 U. S. at 520. In *Fahey* v. *Mallonee,* 332 U.S. 245, 253 (1947), the Court upheld a conservator's summary take-over of an insolvent bank, the procedure being justified by "the delicate nature of the institution and the impossibility of preserving credit during an investigation. . . ." And, in *Ewing* v. *Mytinger & Casselberry, Inc.,* 339 U. S. 594 (1950), this Court allowed the Food and Drug Administration to summarily seize allegedly mislabeled goods.

It clearly emerges from this analysis of the cases that the governmental interests which have in the past been

found by this Court to justify summary action without prior hearing are of an altogether different order than the interest of the state in withdrawing, without hearing "the very means to subsist—food, shelter and other necessities of life." *Shapiro* v. *Thompson*, 394 U. S. 618, 627 (1969). There is no debt owing to the Crown here. Nor is there an emergency threat of harm to other individuals. The state's sole concern is the saving of revenue. Such a justification for denying the fundamental due processes of law has never been recognized by this Court. It should not be recognized for the first time today, in a case where the private interests at stake have never been more vulnerable and deserving of this Court's protection.

E. The Constitutional Due Process Hearing to Which the Welfare Recipient Is Entitled Must Contain, at a Minimum, Nine Basic Elements Recognized by This Court.

> "A fundamental requirement of due process is 'the opportunity to be heard.' . . . It is an opportunity which must be granted at a meaningful time and in a meaningful manner."
>
> *Armstrong* v. *Manzo*, 380 U. S. 545, 552 (1965).

In thus speaking for this Court, Mr. Justice Stewart capsulized centuries of Anglo-American theory and experience. As amicus has suggested in all but the most extraordinary situations only a prior proceeding has been deemed by this Court to satisfy the requirement of a "meaningful time." It now remains to consider the "meaningful manner."

It has already been established (Part I-C, *supra*) that individual assistance cases involve agency "adjudication" as opposed to "rule making." Hence in the case at bar ". . . it is imperative that [an agency administering a program of public assistance] use the procedures which have traditionally been associated with the judicial

process." *Hannah* v. *Larche*, 363 U. S. 420, 442 (1960). Yet to establish that the procedures must be those of a "judicial" process is only to narrow the inquiry. An answer must evolve from a balance between the competing interests presented by the government goal and the individual citizen whose life, liberty, or property the state would seek to affect. In striking this balance, this Court has recognized that when faced with a timely objection from the proposed citizen-target, a meaningful respect for that individual's dignity requires that the government carry the burden of justification as to both the fairness of its methods and the validity of its proposed result. In thus testing the "hurt complained of" against "the good accomplished," this Court has varied the weight of the government's burden in direct ratio to the gravity of the citizen's threatened interest. *Joint Anti-Fascist Refugee Comm.* v. *McGrath*, *supra*, 341 U. S. at 163. In light of the primitive human stake which a welfare recipient risks in any confrontation with the administering agency, amicus now contends that the "fair hearing" must reflect strict adherence to those elements of "fundamental fair play" which this Court has identified as essential to the due process of law.

Were this an area of administrative law lacking in documented experience, amicus would concur in the desirability of an opinion in which this Court limited its observations to the broad outlines of the elements of fundamental fairness here required. Happily, this is not the case.

The decisions of this Court have identified nine elements of basic "fair play" the absence of which, individually or in combination, give rise to a viable claim that due process of law has not been observed.[4] Their appli-

4. These elements are identified and analyzed in Burrus & Fessler, *Constitutional Due Process Hearing Requirements in the Administration of Public Assistance: The District of Columbia Experience*, 16 Am. U. L. Rev. 199, 217-31 (1967).

cation in the field of public assistance administration is not an abstract exercise. In passing upon challenges to statutory programs, this Court has frequently displayed "great deference to the interpretation given the statute by the officers or agency charged with its administration." *Udall* v. *Tallman*, 380 U. S. 1, 16 (1965) (collecting authorities). To this end, amicus has reviewed the provisions of the Handbook of Public Assistance Administration which is promulgated by the Secretary of Health, Education and Welfare pursuant to authority conferred by 42 U. S. C. A. § 1302 (1964).[5] From that record of accumulated experience in dealing with the economically and educationally disadvantaged, amicus finds clear Departmental recognition of the procedural norms which, in other contexts, have been articulated by this Court. All should concede that the norms of due process are flexible (*Hannah* v. *Larche, supra*, 363 U. S. at 442), and that they "cannot . . . be tested by mere generalities or sentiments abstractly appealing." *Joint Anti-Fascist Refugee Comm.* v. *McGrath, supra*, 341 U. S. at 163. Thus it is through a dual analysis of judicial decisions and distilled administrative experience that amicus will contend that strict observance of normative fair play on this primitive plateau of human need is not a matter of administrative grace. Rather, such procedures are a measured response to the demands of due process binding upon appellant in his administration of both categorical and non-categorical assistance programs. For as was stated by this Court many years ago: "The right of a citizen to due process of law must rest upon a basis more substantial than favor or discretion." *Roller* v. *Holly*, 176 U. S. 398, 409 (1900).

Though these administratively defined elements of the hearing for the most part coincide with those elements

5. Provisions of the Federal Handbook were considered by this Court in *King* v. *Smith*, 392 U. S. 309, 317 (1968).

hitherto found by this Court to be constitutionally required, the constitutional inquiry is still essential. The H. E. W. Handbook nowhere suggests that the hearing must occur before entitlement is impaired. The elements set out in the Handbook for the fair hearing are therefore not binding upon the state at the prior hearing, should the state adopt, as did New York, a dual hearing system. Nor would the new H. E. W. regulations, discussed in Part II, *infra*, appear to prohibit the state from adopting such an abbreviated prior hearing. Thus it is imperative that this Court identify the constitutionally required elements which must characterize the hearing the recipient is entitled to receive before his subsistence benefits may be impaired.

1. NOTICE: Within the context of public assistance administration, the current Handbook provisions require that notice of the *ex parte* agency challenge be given in writing to the recipient. This notice must affirm earlier oral information that the recipient has a right to receive a "fair hearing," and that if requested, such a hearing shall be conducted at a time, date, and place convenient to the claimant. Handbook, Part IV, §§ 6200(g) and 6300(j) (as amended by Handbook Transmittal No. 140 (Feb. 8, 1968)). Finally, "[n]otice is given in writing with adequate preliminary information about the hearing procedure necessary for his preparation for the hearing and effective presentation of this case." *Id.*, § 6300(1).

Assuming that this final provision refers to a requirement that the agency's written notice contain sufficient description of the charges being leveled so that the recipient is fairly apprised of the nature of the case he must contest, these provisions of the Handbook would seem to satisfy the due process requirements inherent in the concept of notice and apprisal as articulated by this Court. See, *Willner* v. *Committee on Character & Fitness*, 373

U. S. 96, 107-08 (1963) (Goldberg, J., concurring); *Hanna* v. *Larche*, 363 U. S. 420, 441 (1960); *Greene* v. *McElroy* 360 U. S. 474, 496-97 (1959); *Morgan* v. *United States*, 30 U. S. 1, 17-19 (1938); and, *Roller* v. *Holly*, 176 U. S. 39 409 (1900).

Concerning the element of time, the H. E. W. regulatio sets no arbitrary limit. Amicus believes this policy to b best suited for an administration that recognizes depend ing upon the nature of the charges, the situation of th recipient, his location flexibility is required. It is suff cient for this Court to rearticulate that "the requiremen of notice would be of no value whatever, unless such notic were reasonable and adequate for the purpose." *Rolle* v. *Holly, supra,* at 409.

2. DISCOVERY: Obviously related to the principle o notice is the requirement of some degree of pre-hearin discovery. The current Handbook regulations provid that: "The claimant or his representative will have th opportunity (1) to examine all documents and records use at the hearing. . . ." Part IV, § 6200(i)(1). This ters provision is the subject of elaboration in the section o "Criteria for the Administration of the [conformin State] Plans. There we find it made clear that the claim ant or his representative must have "adequate opportunit to examine material that will be introduced as evidenc prior to the hearing as well as during the hearing. . . Part IV, § 6300(n). And, finally that any material whic is not part of the agency record, or is held as "confidential and thus not something which the claimant has an "op portunity to hear or see" may not be "made a part o the hearing record or used in a decision on the appeal. Th hearing officer does not review the case record, or othe material prior to the hearing unless such material is mad available to the claimant or his representative." *Id* § 6300(o).

Assuming that this right of prior inspection is accorded the recipient or his representative at a point in time sufficient to permit a responsive case, the Handbook provisions appear to be a satisfactory response to the due process requirement that the recipient be accorded an opportunity "to know the claims of the opposing party. . . ." *Morgan* v. *United States,* 304 U. S. 1, 18 (1938).

3. RIGHT OF COUNSEL: By definition, the administration of public assistance benefits takes place among a class of society's least educated and most disadvantaged citizens. When it is recalled that the recipient's stake in a controversy with the agency assumes the gravity of his very means of physical subsistence, *Shapiro* v. *Thompson, supra,* 394 U. S. at 627, the presence of the guiding hand of counsel as a rudiment of fundamental fair play would seem self-evident.

In this area, an analysis of the Handbook regulations must carefully distinguish between those presently enforced and those officially proposed for eventual enforcement. Part IV, § 6200(f) currently provides that the notice to the recipient, which must be given at the time of any agency action affecting his claim, inform him "that he may be represented by others including legal counsel; and of any provision for payment of legal fees by the agency." Part IV, § 6500(c)(3) makes it clear that should the state plan include provision for legal services, federal financial participation is available in sharing such cost. Yet, as of this writing, no provision of the Handbook requires the states to make such services available. On November 30, 1968, the Department announced in the Federal Register a proposed new regulation which would, *inter alia,* require that in all categorical assistance programs, "The services of lawyers will be made available to welfare clients who desire them in fair hearings." Proposed H. E. W. Reg., 33 Fed. Reg. 17853-54 (Nov. 30, 1968). The original target imple-

mentation date for the new regulation, July 1, 1969, was put back to October 1, 1969, by the new Administration. Otherwise, the new regulation was confirmed. See 34 Fed. Reg. 1144 (Jan. 24, 1969). Amicus now understands that the most recent Departmental policy is to push the proposed implementation date back once again, this time until July 1, 1970.[6]

We begin the constitutional analysis of these regulations with *In re Groban*, 352 U. S. 330, 332 (1957), in which this Court acknowledged that a party under scrutiny in an adjudicatory administrative proceeding has a due process right to be "heard through his own counsel." Yet analysis cannot end on this left-handed note unless this class of indigents is to be the victim of an un-ending joke. To say that an indigent recipient of public assistance has a "due process right" to speak through her own attorney at the "fair hearing" is as comforting as a solemn declaration that she has a constitutional right to appear at that hearing swathed in mink. Amicus contends that the time has come for this Court to carry the lesson of *Gideon* v. *Wainwright*, 372 U. S. 335 (1963), yet another limited step by declaring that in the field of public assistance administration the substantial identity of the citizen's stake in the proceedings requires a like regard for his need of legal counsel. In *Gideon* this Court articulated a basic charter of protection for citizens faced with loss of life, liberty, or property in criminal proceedings. In the case at bar, these same in-

6. Further provisions of the currently enforced Handbook regulations make it clear that, should the recipient so desire, he may be represented at the "fair hearing" by a relative or friend. In an express recognition of the value of the "skill and knowledge of the legal profession in these [hearing] matters", the states are urged to make such provision. They are not required to do so, notwithstanding the availability of federal funds to partially defray the costs of such representation. Part IV, § 6400(a) (as amended by Handbook Transmittal No. 140 (Feb. 8, 1968)). And see, *Id.*, § 6300(k).

terests are before this Court. Indeed, the intensity of the loss may be even more pronounced. In the criminal area a frequent danger is the imposition of confinement. In the public assistance field it is often expulsion from the most primitive shelter. The Eighth Amendment would be at once offended if in the confinement situation there was a denial of adequate food or medical attention. In the waste basket for crumpled lives that claims too many of our homeless citizens we have thus far failed to exhibit a similar concern.

A recognition that our civil and criminal jurisprudence do not exist in separate air tight containers has had distinguished spokesmen in the history of this Court. "[T]he right to be heard before being condemned to suffer *grievous loss of any kind*, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society." *Joint Anti-Fascist Refugee Comm.* v. *McGrath*, 341 U. S. at 168 (Frankfurter, J., concurring) (emphasis added). In *Ng Fung Ho* v. *White*, 259 U. S. 276, 284 (1922), Mr. Justice Brandeis, speaking for a unanimous Court, recognized that in an alien deportation case the individual was threatened with a possible "loss of both property and life; or of all that makes life worth living." Such a toll could not be exacted save by compliance with the norms of fair play inherent in the concept of judicial due process.

Unlike the field of criminal justice, the timing of a right to counsel in the context of public assistance administration should not prove troublesome. Amicus contends that when the agency serves notice of its *ex parte* challenge, the proceeding has reached an "accusatory state," and the recipient's right to legal assistance ripens so that he may have professional assistance in assessing the agency's notice and in utilizing his right of discovery in the prepara-

tion of a responsive case. *Cf., Escobedo* v. *Illinois*, 378 U. S. 478, 492 (1964).

4. ORAL HEARING: While a central issue in the trial of this case below, the right of a welfare claimant to present his contentions orally is a basic assumption of the Handbook regulations. Part IV, § 6400(a) (as amended by Handbook Transmittal No. 140 (Feb. 8, 1968)), details the rights of the welfare claimant to present "his case in any way he desires. Some will wish to tell their story in their own way, some will desire to have a relative or friend present the evidence for them, and still others will want to be represented by legal counsel. . . . The hearing is conducted in an informal rather than a formal court-type procedure in order to serve the best interests of the claimant; however, the hearing is to be subject to the requirements of due process." See also Part IV, §§ 6200(i)(5) and 6300(n).

The legal correctness of the Handbook position, and the decision of the court below, may be demonstrated by reference to the decision of this Court in *Londoner* v. *Denver*, 210 U. S. 373, 386 (1908). In that parent case this Court declared: "[A] hearing in its very essence demands that he who is entitled to it shall have the right to support his allegations by argument however brief, and, if need be, by proof, however informal." The point was emphatically stated in *Standard Airlines* v. *C. A. B.*, 177 F. 2d 18, 21 (D. C. Cir. 1949): "[I]n our jurisprudence an opportunity to present contentions orally, with whatever advantages that method of presentation has, is one of the rudiments of the fair play required when property is being taken or destroyed."

5. CONFRONTATION AND CROSS-EXAMINATION: The elements of confrontation and cross-examination go to the very heart of adjudicative procedures. The provisions of the Handbook expressly declare that in addition to a right

to examine all documents and records used at the hearing, the welfare claimant or his representative (be he lay or professional) shall be afforded an opportunity to "question or refute any testimony or evidence." Part IV, § 6200(i)(6). Section 6300(n) reinforces this requirement by declaring that: "The claimant or his representative [must be afforded] adequate opportunity to examine material that will be introduced as evidence prior to the hearing as well as during the hearing, to give all the evidence on points at issue he believes necessary without undue interference, to ask for substantiation of any statements made by others, and to present evidence in rebuttal." The integrity of these attempts to insure the welfare claimant an opportunity to know, to confront, and to test the adverse evidence and witnesses which the agency proposes to use against him is insured by a final provision that evidence which the claimant has "not [had] an opportunity to hear or see is *not* [to be] *made a part of the hearing record or used in the decision on the appeal.*" *Id.*, § 6300(o) (emphasis added).

Such stringent protection is in accord with historical experience and the decisions of this Court. That the concept of the faceless informer is contrary to our basic notions of "fair play" is easily documented. As early as 100 A. D., the Roman Emperor Trajan admonished Pliny the Younger that: "Anonymous information ought not to be received in any sort of prosecution. It is introducing a very dangerous precedent, and is quite foreign to the spirit of our age." 9 Harvard Classics, 428 (quoted in *Carlson* v. *Landon*, 342 U. S. 524, 552 (1952) (Black, J., dissenting). This Court has been no more hospitable. In *Greene* v. *McElroy*, 360 U. S. 474, 496 (1959):

> Certain principles have remained relatively immutable in our jurisprudence. One of these is that where government action seriously injures an individual, and

> the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. . . .

In addition to the authorities collected in *Greene* v. *McElroy, supra* at 497, see *Peters* v. *Hobby*, 349 U. S. 331, 351 (1955) (Douglas, J., concurring); *Gonzales* v. *Freeman*, 334 F. 2d 570, 578 (D.C. Cir. 1964); and, *Rios* v. *Hackney*, 294 F. Supp. 885 (N.D. Tex. 1967) (a welfare case turning on this precise point).

6. Right to Present Evidence and Make Argument: The provisions in the Handbook which guarantee to the welfare client or his representative the opportunity to "give all the evidence on points at issue he believes necessary without undue interference," and "to advance any arguments without undue interference" have already been reviewed. Part IV, §§ 6300(n), and 6200(i)(5). In their combined effect, they guarantee to the welfare client the essence of an adjudicatory hearing.

Again, the decision of this Court in *Londoner* v. *Denver*, 210 U. S. 373, 386 (1908), stands for the proposition that in according the welfare claimant the rights to present evidence and make oral argument, the Department is not acting out of discretion or grace, but is complying with the requirements of procedural due process. *Esteban* v. *Central Missouri State College*, 277 F. Supp. 649, 651 (W.D. Mo. 1967).

7. IMPARTIAL TRIBUNAL: The Handbook provisions contain no fewer than five distinct provisions designed to insure to the welfare claimant that his cause was heard before an impartial official; and, when requested, the appeal processed by an impartial appeals authority. Part IV, § 6200(d) requires that all state plans qualifying for an infusion of federal funds shall insure that "hearings will be conducted by an impartial official (or officials) of the State agency." As amplified in the sections on criteria for administration of state plans, the "impartial official" is denominated as an official of the state agency who is responsible for conducting the hearing, and who "has not been involved in any way with the action in question." *Id.*, § 6300(h). The point is again made in the section officially interpreting the requirements of section 6200. "The person conducting the hearing shall not have been connected in any way with previous actions or decisions on which the appeal is made." *Id.*, § 6400(c). Where an appeal is taken from the result of a "fair hearing" to the State hearing review authority, the Handbook regulations are insistent that that authority, too, should be "impartial." Again, "The hearing authority shall not have been directly connected with the agency action about which the claimant is appealing. . . ." *Id.*, § 6400(f). And see *Id.*, § 6300(g).

The requirements laid down by this Court would seem satisfied by the aforementioned regulations. Having begun with the proposition that the Due Process Clauses forbid a trial before a judge who has a direct, personal, pecuniary interest in the outcome (*Tumey* v. *Ohio*, 273 U. S. 510 (1927)), this Court refused to hold partial a hearing officer merely on the ground that he was affiliated with the administrative body in question. *F.T.C.* v. *Cement Institute*, 333 U. S. 683 (1948). The regulation, excluding as impartial an official who had a prior contact with the decision under review, is mandated by the decision of this Court *In re*

Murchinson, 349 U. S. 133 (1955), which forbids the practice of any official sitting in judgment as to the propriety of his own actions or decisions.

8. DECISION ON THE RECORD: All of the above-mentioned procedural protections are easily circumvented unless the hearing officer is restricted in his decision to the record developed in a truly "fair hearing." Part IV, § 6300(o) has already been reviewed. Suffice it to recall at this point that this provision of the Handbook excludes from the hearing record all evidence and witnesses which the claimant has not had "an opportunity to hear or see. . . ." Section 6200(l) declares: "The *hearing officer's recommendations shall be based exclusively on evidence and other material introduced at the hearing.* The verbatim transcript of testimony and exhibits, or an official report containing the substance of what transpired at the hearing . . . will constitute the exclusive record for decision by the hearing authority and will be available to the claimant at a place accessible to him or his representative at any reasonable time." (As amended by Handbook Transmittal No. 140 (Feb. 8, 1968).) [Emphasis added.]

Such a safeguard is consonant with the leading pronouncement by this Court requiring decisions to be based exclusively upon the record developed at the "fair hearing". In *Ohio Bell Telephone Co.* v. *Public Utilities Comm'n. of Ohio*, 301 U. S. 292, 300-04 (1937), this Court held that reliance on tax values and other materials which had not been introduced into evidence "constituted a denial of due process." The Court observed: "The fundamentals of a trial were denied to the appellant when rates previously collected were ordered to be refunded upon the strength of evidential facts not spread upon the record. . . . This is not the fair hearing essential to due process. It is condemnation without trial." 301 U. S. at 300. This point was placed in perspective along with the other elements

of "fair play" by this Court in *I.C.C.* v. *Louisville & Nashville R. Co.*, 227 U. S. 88, 93-94 (1913):

> . . . All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense. In no other way can it test the sufficiency of the facts to support the finding; for otherwise, even though it appeared that the order was without evidence, *the manifest deficiency could always be explained on the theory that the Commission had before it extraneous, unknown but presumptively sufficient information to support the finding.* (Emphasis added).

Finally, the requirement that decisions be upon the record, including the necessity of a statement of findings of fact and conclusions of law, reflects the decision of this Court in *Wichita R. & Light Co.* v. *Public Util. Comm'n. of Kansas*, 260 U. S. 48, 57-59 (1922).

9. JUDICIAL REVIEW: This final element is included as an "insurance policy" that all the others will be observed, or failing their observance, that a judicial remedy will be provided to save the citizen from the imposition of arbitrary or capricious behavior. And yet it is at this juncture that the Handbook regulations cease to be of effective assistance. Part IV, § 6400(i) suggests no more than that the availability of judicial review will depend upon the laws of the individual states. Amicus does not find the law to be thus settled by this Court.

With respect to questions of "constitutional fact," the judicial power of the courts can never be ousted. *Ohio Valley Water Co.* v. *Ben Avon Borough*, 253 U. S. 287, 291 (1920). If the inherent power of review arising from the constitutional separation of powers extends to a *de novo* consideration of the questions of law, it may also have considerable sweep as to questions of fact. This has been

recognized as being true where a citizen's "fundamental rights" hang in the balance. In *Crowell* v. *Benson*, 285 U. S. 22, 56-57 (1932), this Court framed the question as follows:

> . . . [W]hether the Congress may substitute for constitutional courts, in which the judicial power of the United States is vested, an administrative agency . . . for the final determination of the existence of the facts upon which the enforcement of the constitutional rights of the citizen depend. The recognition of the utility and convenience of administrative agencies for the investigation and finding of facts within their proper province, and the support of their authorized action, does not require the conclusion that there is no limitation of their use, and that the Congress could completely oust the courts of all determinations of fact by vesting the authority to make them with finality in its own instrumentalities or in the Executive Department. That would be to sap the judicial power as it exists under the Federal Constitution, and to establish a government of a bureaucratic character alien to our system, whenever fundamental rights depend, as not infrequently they do depend, upon the facts, and finality as to facts becomes in effect finality in law.

And see, *Stark* v. *Wickard*, 321 U. S. 288, 309-310 (1944). Where, as in the case at bar, the citizen's interest transcends the "fundamental" and assumes the most primitive posture, this Court should be loath to see any erosion upon the "inherent review power" of the judiciary.

II. THE NEW H. E. W. REGULATIONS CANNOT SERVE AS THE BASIS FOR A NON-CONSTITUTIONAL RESOLUTION OF THIS CASE, AND ARE UNCONSTITUTIONAL ON THEIR FACE.

A. The H. E. W. Regulations Cannot Serve as the Basis for the Court's Resolving This Case in a Non-Constitutional Manner.

The Department of Health, Education and Welfare has recently promulgated regulations which will supersede, in the categorical assistance programs, the New York fair hearing regulations found unconstitutional by the three-judge district court below. These new regulations provide, in pertinent part, as follows:

> "Effective October 1, 1969, a State plan for OAA, AFDC, APTD, AABD, or MA under the Social Security Act must provide that:
>
> > "(1) When a fair hearing is requested because of termination or reduction of assistance, involving an issue of fact, or of judgment relating to the individual case, between the agency and the appellant, assistance will be continued during the period of the appeal and through the end of the month in which the final decision on the fair hearing is reached. (If assistance has been terminated prior to timely request for fair hearing, assistance will be reinstated.) Where delays are occasioned during the period of the appeal, assistance will be continued if the delay is at the instance of the agency or because of illness of the claimant or for other essential reasons. To the extent that there are other delays at the request of the claimant the agency may but is not required to continue assistance." 34 Fed. Reg. 1144 (January 24, 1969).

As of this writing, these regulations are binding upon the states October 1, 1969. However, amicus has reason

to believe that H. E. W. will delay their implementation until July 1, 1970. Whichever the case, these proposed regulations may not serve as the basis for a non-constitutional resolution of this case.

If the proposed regulations do not go into effect until July 1, 1970, the present federal regulations, which say nothing about the prior hearing (Handbook, Pt. IV, ch. 6000), and the current New York regulations are controlling. Both sets of regulations are unconstitutional.

If, on the other hand, implementation of the H. E. W. regulations is not delayed, or if the Court should find them to be nevertheless operative, it would be necessary to rule on them as law. "A change in the law between a nisi prius and an appellate decision requires the appellate court to apply the changed law." *Ziffrin, Inc.* v. *United States,* 318 U. S. 73, 78 (1943). The Court has recently held that this principle "applies with equal force where the change is made by an administrative agency acting pursuant to legislative authorization." *Thorpe* v. *Housing Authority of Durham,* 393 U. S. 268, 282 (1969). Thus, as to the categorical assistance programs, it would be the new H. E. W. regulations, rather than the to-be-obsolete New York standards, which the Court would have to measure against the strictures of constitutional due process. In such a case, it would still be improper for this Court to resolve the case on the basis of the new regulations. This is so for several reasons.

Six of the original and intervening plaintiffs in this case are recipients of local general assistance, for which no federal funds are provided. *Kelly* v. *Wyman,* 294 F. Supp. 893, 902 (S. D. N. Y., 1968). The Social Security Act, and the regulations promulgated by the Department of Health, Education and Welfare pursuant to it, do not reach such purely local programs. Thus, the H. E. W. regulations

involved in this case have no binding effect upon the plaintiffs who are recipients of general assistance. As to them, it is necessary for this Court to reach constitutional grounds of decision.

Furthermore, though this case may bear some superficial resemblance to that presented the Court in *Thorpe v. Housing Authority of Durham, supra,* the issues presented here cannot be disposed of in a manner analogous to *Thorpe.* The question presented to the Court in that case was whether a tenant in a federally assisted housing project could be evicted without first being given notice of the reasons for his eviction, and some opportunity to reply to the evicting authority. While the case was pending before this Court, H. U. D. issued a circular which imposed a mandatory requirement upon all housing authorities to inform the tenant " 'in a private conference or other appropriate manner' of the reasons for eviction, and give him 'an opportunity to make such reply or explanation as he may wish'." 393 U. S. at 272-73. Given this H. U. D. circular, the Court found it unnecessary to reach the constitutional merits of the case, declining to consider whether the H. U. D. regulations would provide the petitioner with a hearing consonant with the requirements of due process. The reasons for the Court's refusal to reach the constitutional merits in *Thorpe* sharply distinguish it from the case now before the Court.

There was nothing in the H. U. D. circular which would have prevented the local authority from giving a tenant a full due process hearing prior to eviction. In contrast, the H. E. W. regulations involved in this case are, on their face, inconsistent with the requirements of due process. But even more critical is the fact that the Court in *Thorpe* recognized that in the case of a person about to be evicted from public housing, there need be no due process hearing before the housing authority, so long as the tenant

has been given notice of the reasons for the proposed e
tion. "Moreover, even if the Authority does not
vide such a hearing, we have no reason to believe
once petitioner is told the reasons for her eviction
cannot effectively challenge their legal sufficiency in w
ever eviction proceedings may be brought in the N
Carolina courts." 393 U. S. at 284. The fact that th
is opportunity for such *de novo* judicial review before
administrative action takes effect removes the const
tional necessity for a prior hearing before the age
Nickey v. *Mississippi*, 292 U. S. 393, 396 (1934), and clea
differenciates the plight of the public housing tenant fr
that of the welfare recipient. There is no alternative
portunity for *de novo* judicial review before welfare
withdrawn, and so the constitutional requirement of
process calls for a trial-type administrative hearing
fore the welfare department may reduce or withdr
assistance.

For the reasons which will be articulated below, ami
submits that the regulations promulgated by H. E.
compound rather than obviate the necessity of the Cou
reaching the constitutional merits of this case. Oth
wise, amicus fears that the regulations will serve as
basis for the unconstitutional deprivation of the rig
of welfare recipients in all of the fifty states.

B. The H. E. W. Regulations Are Inconsistent With the Fundamental Principles of Due Process and Are Thereby Unconstitutional.

1. The Regulations Promulgated by H. E. W. Permit and Encourage the States to "Suspend" Assistance Without Affording an Opportunity for a Prior Hearing.

The H. E. W. regulations state, in part, that:

> "When a fair hearing is requested *because of termination or reduction* of assistance, involving an issue of fact, or of judgment relating to the individual case, between the agency and the appellant, assistance will be continued during the period of the appeal. . . ." 34 Fed. Reg. 1144 (Jan. 24, 1969) (emphasis added).

By confining the requirement that assistance be continued during the hearing process to merely terminations and reductions of assistance, the H. E. W. regulations permit and encourage the states to continue the practice of withdrawing public assistance without first affording an opportunity to be heard.

In administering the categorical assistance programs, both H. E. W. and the states have long distinguished between "termination" of benefits, and their "suspension." Termination or discontinuance of benefits refers to the permanent withdrawal of assistance, based upon an agency determination that the recipient is no longer eligible. In contrast, the "suspension" of benefits refers to the temporary withdrawal of assistance, usually when the agency is uncertain as to the recipient's continuing eligibility; benefits remain suspended until the question of eligibility is resolved, and the recipient is then either reinstated or terminated. Thus, New York regulations have provided that "suspension shall mean that all public assistance in the present program is stopped for a temporary period," and explain that "Public Assistance payments may be sus-

pended under the following circumstances: . . . (b) continuing eligibility is questionable and under investigation." N. Y. Official Compilation of Codes, Rules and Regulations, tit. 18, ch. II, § 351.22(c) (3). This distinction between termination or discontinuance, on the one hand, and suspension on the other, has been employed by many states, including not only New York, but also Arizona,[7] Connecticut,[8] Delaware,[9] Illinois,[10] and Mississippi.[11] The distinction is also recognized by H. E. W., for in its own regulations, specifying those agency actions with respect to which an aggrieved recipient may request a fair hearing, H. E. W. distinctly lists two such actions as "*suspension or discontinuance* of assistance in whole or in part. . . ." Handbook, Pt. IV, § 6300(c)(1) (emphasis added). Thus, in the administration of welfare, clear distinctions are drawn between the suspension of assistance, and its more permanent withdrawal. Against the background of this administrative practice, the omission of suspensions from the H. E. W. regulation becomes critical.

If the States are not required to continue assistance in both cases of proposed terminations and suspensions, any such regulation seeking to guarantee the constitutional rights of recipients will be thoroughly emasculated, as has occurred recently in the state of Mississippi. *Williams* v. *Gandy*, Civ. No. GC 6728 (N. D. Miss., filed June 9, 1967), was one of the earliest challenges to the practice of withdrawing assistance without affording opportunity for a prior trial-type hearing. The suit was settled when Mis-

7. ARS § 46-211A.

8. Conn. State Welfare Dept., Manual: Social Service Policies —Public Assistance § 370.3(A).

9. Del. Code Ann., tit. 31, § 508 (Supp. 1965).

10. Ill. Dept. of Public Welfare, Manual of Categorical Assistance, ch. 8200.

11. 3 Miss. Dept. of Public Welfare, Policies & Procedures for Administration of Public Assistance 7220-21.

sissippi agreed to promulgate what is one of the most liberal fair hearing regulations in the country. These regulations give the recipient 20 days in which to request a fair hearing from a proposed termination of assistance. If within this period the recipient makes a request for a fair hearing, his grant will be continued until the hearing has been held and a decision is reached. 3 Miss. Dept. of Public Welfare, Policies and Procedures for Administration of Public Assistance, 6101-03; State Dept. of Public Welfare, Bulletin No. 1335 (April 15, 1968). However, these same regulations refer separately to "termination" of the grant, as distinct from "changes in the amount of the grant," "suspension," and "withholding of payment." And in implementing the regulations, the Mississippi Department does not continue assistance for the 20 day period where "suspension" and "withholding" of the grant are involved. In this way, the state is able to continue its practice of withdrawing assistance without opportunity for a prior hearing, despite the existence of these handsome regulations.

The regulations proposed by Mississippi in response to the *Gandy* suit no more resolved the issues in that case than would the H. E. W. regulations solve the present controversy. Both are as tents pitched upon shifting sands. Neither afford any more than illusory protection in an area where the Constitution requires safeguards that are meaningful in actual fact.

2. The H. E. W. Regulations, Requiring the Continuation of Assistance Only in Cases Where the Request for a Hearing Is Based Upon Issues of Fact or of Judgment, Permit and Encourage the Arbitrary Denial of Due Process Rights.

Under the terms of the H. E. W regulation, it is not enough for the recipient whose assistance is about to be reduced or withdrawn to merely request that he be given

a fair hearing in order to effect the continuation of his benefits during the period of the appeal. For the welfare department is given the duty of then determining, on the basis of type of issue involved in the appeal, whether the recipient's assistance is to be immediately reduced or withdrawn, or whether the case qualifies for the continuation of benefits during the fair hearing process. While the standards given the welfare department for making this critical judgment are probably not in themselves invalid, they are such that not even the most talented and well-meaning welfare officials could either understand or meaningfully follow them. The consequence of vesting such effectively unfettered discretion is to encourage what is certain to be an arbitrary and costly abridgement of the due process rights of recipients.

The H. E. W. regulations provide, in part, that:

> "When a fair hearing is requested because of termination or reduction of assistance, *involving an issue of fact, or of judgment relating to the individual case*, between the agency and the appellant, assistance will be continued during the period of the appeal . . ." 34 Fed. Reg. 1144 (Jan. 24, 1969) (emphasis added).

There are several constructions which might be given to the emphasized language. The most obvious meaning is also the most objectionable—namely, that the local welfare department may discontinue the assistance of a recipient, despite his request for a fair hearing, where the department is unable to find any issues of fact or of judgment involved in the appeal. Such an interpretation would in effect allow the department to conclude that its own case against the recipient was so clear and one-sided that no "issues" were presented, despite the fact that the recipient's timely request for a fair hearing entitles him to administrative review. Such an interpretation of the regulation, which would permit the very authorities who are

meant to be restrained by the requirements of due process to make their own determination of what due process protections are warranted, would be a grotesque perversion of a fundamental constitutional principle, and would render it a practical nullity.

A more reasonable meaning to be given the language of the regulation is that it is meant to represent a loose translation of the distinction often drawn in administrative law between legislative and adjudicative facts. See part I-C, *supra*. The inclusion of this language in the regulation would then appear to merely repeat the doctrine that a recipient has a right to a prior trial-type hearing only in cases involving issues of adjudicative fact. While this is a satisfactory doctrine as a doctrine, its practical application in the welfare area by local welfare authorities only serves to invite its distortion and the consequent denial of a *prior* hearing in cases where individual recipients are constitutionally entitled to one.

As amicus has suggested in Part I-C, *supra*, in every case in which a recipient of public assistance contests a threatened reduction, suspension or termination of his previously determined statutory entitlement, the proceeding is inherently and fundamentally adjudicative, even when the sole issue raised is the legality of the agency regulation or policy. Thus, the distinction is at best irrelevant in the context of welfare, for if properly drawn, the result would be that benefits would be continued in virtually every case in which a recipient seeks to contest a threat to his entitlement.

The difficulty is that the distinction is not going to be properly drawn by those charged with making it, with the result that many who are constitutionally entitled to a *prior* hearing will not receive one. Welfare officials have never had occasion to draw any distinction between the types of fact involved in an appeal. Davis has noted that,

as regards the "distinction between legislative and adjudicative facts . . . the line is sometimes difficult or impossible to draw," and that "in the borderland the distinction often has little or no utility." 1 K. Davis, Administrative Law Treatise, § 7.02 at 414 (1958). If it is true, as Davis suggests, that even "the courts have seldom been articulate about the cardinal distinction between adjudicative and legislative facts . . ." (*Id.* at § 7.06, p. 429) it would be unreasonably optimistic to expect welfare officials who have never before been vested with the duty of drawing such distinctions to do so with any precision or consistency. Perfectly administered, the result would be the continuation of assistance during the appellate process in no less than 100% of the cases where benefits are threatened. Imperfectly administered, as cannot help but be the case, the result is the certain withdrawal of benefits from the needy by means which violate their fundamental constitutional rights.

A regulation which incorporates standards that cannot be either interpreted or meaningfully applied by officials who are constitutionally bound by them is pernicious and invalid, for the actions which those officials purport to take under the guidance of such standards cannot be other than arbitrary and capricious. "Arbitrary power and the rule of the Constitution cannot both exist. They are antagonistic and incompatible forces; and one or the other must of necessity perish whenever they are brought into conflict." *Jones* v. *S. E. C.*, 298 U. S. 1, 24 (1936).

3. The H. E. W. Regulations Shift to the Recipient the Critical Burden of Justifying a Prior Hearing, and Thereby Erect an Impermissible Barrier to the Exercise of His Due Process Rights.

As noted above, the burden of distinguishing "legislative" from "adjudicative" facts has frequently proved "difficult or impossible to draw" even when that task was assumed by appellate judges. The new H. E. W. regulation would turn the task over to low echelon bureaucrats in the fifty-one welfare establishments. As an abstraction, this might not offend. But when a constitutional right as enunciated by this Court (*Garfield* v. *Goldsby*, 211 U. S. 249, 262 (1908))—protective of a disadvantaged citizen's most primitive interest, "the very means to subsist" (*Shapiro* v. *Thompson*, 394 U. S. 618, 627 (1969))—is made the unwilling captive in such a free-wheeling delegation, the encroachment upon the "essence of due process" is hardly petty.[12] *Garfield* v. *Goldsby*, *supra* at 262. Within this administrative nightmare, the welfare recipient is left to shift for himself in the hope that he can frame his request for a hearing in such an artful manner so as to convince the local welfare office that his is a case involving only "an issue of fact, or of judgment". The mocking travesty of placing this burden upon a class of educationally and economically

12. As amicus has demonstrated to this Court at some length above, the fundamental rule of constitutional due process is that a person aggrieved by an administrative action is entitled to a trial-type hearing before that action becomes effective. *Garfield* v. *Goldsby*, 211 U. S. 249 (1908). The only exceptions to this rule of a prior opportunity to be heard are those in which the state can demonstrate a peculiarly urgent and emergency need for immediate summary action. Summary action being the rare exception to the usual rule, the burden lies with the government of justifying its need for such an extraordinary procedure. Comment, *Withdrawal of Public Welfare: The Right to a Prior Hearing*, 76 Yale L. J. 1234, 1240 n. 26 (authorities collected) (1967). The H. E. W. regulation, by shifting the effective burden to the recipient, violates this fundamental principle of due process.

disadvantaged citizens should be sufficient to constitutionally condemn this regulation even if the test were analogous to that applied in *Rochin* v. *California*, 342 U. S. 165, 172 (1952). The inability of a grade-school dropout to frame even a simple "request for a hearing" has been fully recognized by the Department which now seeks to hold such persons to the standards of code pleading. A contrast between the silence of the new "prior hearing" regulation, and the Handbook provisions governing a request for a hearing is disturbing, to rest the objection of amicus in the most restrained language.

"A request for a hearing is considered as any clear expression (oral or written) by the claimant (or person acting for him, such as his legal representative, relative, or friend) to the effect that he wants an opportunity to present his case to higher authority." Handbook, Part IV, § 6300(b). The administering state agency is admonished that it is not to limit or in any manner interfere with the freedom of the claimant in making such requests. On the contrary, it is to create an atmosphere designed to facilitate the submission and processing of such requests, and even offer assistance in preparing the claimant's case. *Ibid.*[13] All of these safeguards, aptly reflecting the Department's appreciation of the welfare client's limited capacity to intone the magic word at the magic moment, existed when the scope of the fair hearing admitted of no artificial limitations.[14] And yet this is the same Department which

13. In addition, the Handbook criteria require that the claimant be given written notification, and to the extent that it is possible in a given case, oral explanation of the right to and procedure for requesting a fair hearing at the time of his initial application. Such written and oral notice must be repeated at the time of any agency action adversely affecting an established grant. Handbook, Part IV, § 6300(j).

14. As noted above the opportunity for a fair hearing expressly included: "Consideration of the agency's interpretation of the law, and the reasonableness and equitableness of the policies pro-

would now condition fulfillment of this Court's due process command on the ability of the blind, the aged, the infirm, the untutored minor, and the hungry to complete an unescorted journey through the eye of an administrative needle.

"In all kinds of litigation it is plain that where the burden of proof lies may be decisive of the outcome." *Speiser* v. *Randall*, 357 U. S. 513, 525 (1958). It is decisive in this case. The recipient may have a very short time in which to request a fair hearing before he suffers the loss of his benefits. Those states which have been ordered by a court to continue assistance until there has been an opportunity for a fair hearing, have held open the opportunity to request a fair hearing for only a very brief number of days. Thus, the period in Michigan is ten days, *Moore* v. *Houston* (Civ. No. 104435, Mich. Cir. Ct., Wayne County, consent judgment entered Nov. 1, 1968), and in New York, seven days (*Kelly* v. *Wyman*, 294 F. Supp. 893 (S. D. N. Y., 1968)). Such short time periods are likely to appear in other states as well, as more states are judicially compelled to abide by the norms of due process. It is in this perhaps short period of time that the recipient must put together his critical request for a prior hearing.

Even in states where the time period may be more generous, the burden is overwhelming. There is no right to appointed counsel at this stage of the process, the proposed regulations only granting this right for the fair hearing itself. 34 Fed. Reg. 1144 (Jan. 24, 1969). But even the assistance of counsel might be of little value, for though

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mulgated under the law, if the claimant is aggrieved by their application to his situation . . ." Handbook, Part IV, § 6300(c)(2). Under the former Handbook scheme, unfettered cooperation between the aggrieved recipient and the agency was viable for at the "request" stage their eventual difference was not a critical factor. Under the new regulations, the "request" stage is critical for it is now adversary in nature.

the recipient has been given notice of the reasons for the proposed reduction or withdrawal of assistance, there is not until the fair hearing an adequate opportunity to discover the specific basis for the Department's intended action. Without such a basis, it is cruelly unjust to expect the recipient to demonstrate in his request for a fair hearing that there are in fact very specific issues of fact and/or judgment involved, so as to preserve his benefits during the extended hearing process. Such a regulation requires the recipient, under penalty of sacrificing his constitutional rights, to know long before the fair hearing what it is the very function of the hearing to inform him of. And even were it so possible for the recipient to obtain all of this information at the time he must request the hearing, it is extremely unlikely that he is versed or subtle enough to assemble his case so as to satisfy the burden rested upon him by this regulation.

In short, it is altogether clear that the H. E. W. regulation, by upending the accepted principle of due process, places upon the welfare recipient a burden which he cannot possibly sustain, with the result that he is deprived of his constitutional right to be heard before the bare means of subsistence are taken from him. Such a regulation is a pitiful alternative to the breastwork of protection required by the Constitution.

4. The H. E. W. Regulations Permit the States to Reduce or Withdraw Assistance Until Such Time as the Recipient Requests a Fair Hearing, Thereby Depriving Him of His Right To Be Heard Before His Statutory Entitlement Is Impaired.

The H. E. W. regulation explicitly states that it is permissible for the state to reduce or withdraw asistance immediately, and for as long a period as it takes the recipient to make a timely request for a fair hearing. The regulation states, in part, that:

> When a fair hearing is requested . . . assistance will be continued during the period of the appeal and through the end of the month in which the final decision on the fair hearing is reached. (*If assistance has been terminated prior to timely request for fair hearing, assistance will be reinstated.*) 34 Fed. Reg. 1144 (Jan. 24, 1969) (emphasis added).

Because the regulation so sanctions the withdrawal of assistance prior to and without the opportunity to be heard, it fails to satisfy the basic due process requirement that there be an opportunity to be heard *before* the administrative action becomes effective. The fact that assistance may be reinstated once a request for a hearing has been made does not alter the very real fact that the recipient may have been deprived of the very means of survival for a period of perhaps several months. Such a procedure is no less offensive to the basic norms of due process than were the recipient only reinstated after the fair hearing. The difference is at best one of a few months; neither constitutional principles nor human needs are so calibrated.

The Federal Handbook does not specify the amount of time the states must allow the recipient to request a fair hearing. The Handbook merely requires that a "reasonable time" be allotted. Handbook, Pt. IV, § 6300(d). The states have all interpreted this requirement so as to give aggrieved recipients a lengthy time in which to make such a request. California is perhaps the most generous, requiring only that the request be filed "within one year after the order or action complained of." Cal. Wel. & Inst. Code, § 10951. Most of the states typically allow a period of two to three months. A few states, as has already been noted, have considerably shorter periods, but these are states which have been judically compelled to continue assistance until there has been an opportunity for a hearing. None of these states was permitted to adopt the

procedure, sanctioned by this H. E. W. regulation, of withdrawing assistance at once, and only continuing it from the time a fair hearing request was entered. Had they been allowed to do so, it is unlikely that they would have so reduced the period for making a timely request. Consequently, in considering the effect of the H. E. W. regulation, it is not unreasonable to assume that states would continue to retain the two to three month request period, and that assistance might be withheld for up to 90 days in cases where recipients operated within the state-established time periods.

To contend that such an extended withdrawal of assistance, before there has been an opportunity to be heard could be cured by the tardy recipient himself is to ignore the hard reality that welfare recipients are not only poor and unsophisticated, but that they are easily confused and intimidated by the complexities of the modern day, red-taped world. They do not read all of the notices spun out for their benefit; it may be a week or more before they realize that the welfare check is not just late this month but somehow missing; if they know where to go to talk about the sudden turn in their lives, it may be even more days before the bus or subway fare to make the trip is scraped together. This is not mere fiction. For what other reason would the vast majority of the states, in interpreting the federal requirement that a "reasonable" time be allowed, have given recipients at a minimum two months in which to appeal from a loss in benefits?

The length of time for which a recipient's benefits might be withheld under the H. E. W. regulations is further compounded by the fact that a state which pays welfare grants on a monthly basis may "reinstate" the recipient to the rolls immediately upon receiving his timely request for a hearing, though not actually resuming the critical flow of assistance until the next pay period arrives, perhaps

additional full month away. Nothing in the regulation would prevent such added delays, nor is there any suggestion that the state must make retroactive payment at the time it reinstates the recipient for the period during which benefits were withheld.

This H. E. W. regulation directly conflicts with the due process requirement that assistance be continued until there has been an opportunity for a hearing. To hold otherwise is to permit the emasculation of basic constitutional safeguards which were designed to protect all citizens, including the poor, against the arbitrary action of government. This Court recognized more than thirty years ago that

> "if the various administrative bureaus and commissions, necessarily called and being called into existence by the increasing complexities of our modern business and political affairs, are permitted gradually to extend their powers by encroachments—even petty encroachments—upon the fundamental rights, privileges and immunities of the people, we shall in the end, while avoiding the fatal consequences of a supreme autocracy, become submerged by a multitude of minor invasions of personal rights, less destructive but no less violative of constitutional guaranties."

Jones v. *S. E. C.*, 298 U. S. 1, 24-25 (1936).

CONCLUSION.

For the foregoing reasons, it is the prayer of amicus that the judgment entered by the court below be modified, and as so modified, affirmed. In so doing, this Court should declare that the "right vs. privilege" dichotomy is contrary to the rule that all governmental action must be subjected to the test of due process. This Court should further declare that every citizen has a fundamental personal interest in survival at a subsistence level, and that government may never jeopardize or impair this primitive in-

terest without first satisfying the most stringent standards of fairness. The Court should hold that welfare benefits may never be terminated, suspended, reduced, conditioned or otherwise withdrawn until the aggrieved recipient has had an opportunity for an adequate hearing, which must include, at a minimum, these constitutionally required elements: notice; discovery; the right to counsel; an oral hearing; confrontation and cross-examination; the right to present evidence and make oral argument; an impartial tribunal; decision on the record; and judicial review. In conclusion, this Court should advise that because the Constitution requires a full, trial-type hearing before a welfare recipient's statutory entitlement may be adversely affected, a dual hearing system of the type approved by the court below cannot satisfy the requisites of due process unless the prior hearing is itself the full and fair hearing.

Dated, Chicago, Illinois, August 30, 1969.

Respectfully submitted,

VICTOR G. ROSENBLUM,
3203 S. E. Woodstock Boulevard,
Portland, Oregon 97202,

CRAIG W. CHRISTENSEN,
DANIEL WM. FESSLER,
25 West Chicago Avenue,
Suite 500,
Chicago, Illinois 60610,
Attorneys for Amicus Curiae, National Institute for Education in Law and Poverty.

Of Counsel:
CHRISTOPHER N. MAY,
Director of Research for Amicus Curiae, National Institute for Education in Law and Poverty.

No. 62

Vide No. 14 for Brief
of U. S. as amicus curiae.
(filed on Sept. 10, 1909.)